Arab-Malaysian Finance Bhd v Borneo Wood (Sabah) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–1110 OF 1997
RAMLY ALI J
26 NOVEMBER 2007

Hire Purchase — Hire purchase agreement — Guarantor — Whether alleged hire purchase agreements were properly terminated — Whether claim was pre-matured

Hire Purchase — Hire purchase agreement — Purchase of machineries — Agreement listed three goods cumulatively instead of item by item — Application of Hire Purchase Act 1967 — Whether Hire Purchase Act 1967 codification of common laws

Hire Purchase — Hire purchase agreement — Purchase of machineries — Whether transaction loan of money — Delivery and installation of machineries completed before the signing of the alleged HP agreements — Whether a bill of sale disguised as hire purchase transaction — Bill of Sale Ordinance 1936 (Sabah) s 2

The plaintiff's claim was for the total outstanding amount under two hire purchase agreements ('HP agreements') entered into between the first defendant and the plaintiff, both dated 12 February 1996. The second and third defendants were the guarantors for the alleged HP agreements. Before the material time of entering into the HP agreements, the subject machineries were delivered and duly installed at the first defendant's factory. By a notice of demand dated 23 September 1997, the plaintiff demanded from the second and third defendants payment of the instalments in arrears amounting to a total sum of RM181,709.37 and stipulated therein that unless such arrears were settled, the two alleged HP agreements 'shall be deemed terminated'. The machineries under the HP agreements were not repossessed by the plaintiff nor were they returned by the first defendant. There was also no offer by the plaintiff to the second and third defendants to purchase the machineries. The second and third defendants averred that: (i) the transaction between the plaintiff and the first defendant were not hire purchase transaction but were loan transaction secured upon bill of sale and, accordingly, the consideration for giving the guarantee failed; (ii) the terms of

the HP agreements had been substantially varied without the guarantors' consent thereby discharging them of their liability under the guarantee; (iii) there was no proper termination of the HP agreements and, accordingly, the plaintiff's claim in this action was premature and also for a sum not due to it; and (iv) there being no offer of the machineries to the second and third defendants the condition precedent for suing the second and third defendants was not fulfilled before the commencement of this action.

Held, dismissing the claims with costs:

(1) For a transaction to qualify as a hire purchase transaction, it necessitates that 'property and title' of the subject good would never pass to the hirer at the beginning of the transaction. The 'property and title' are retained by the financier and the hirer is only given an option to purchase the subject goods upon full payment of the instalments stipulated thereunder (see para 19).

(2) On the facts, with the delivery and installation of the subject machineries at the first defendant's factory, it was clear that the 'properties and titles' of the machineries would have passed to the first defendant on 21 August 1995, ie before the signing of the alleged HP agreements, both dated 12 February 1995. Thus, the transaction between the plaintiff and the first defendant could not have been hire purchase transaction (see paras 21–27).

(3) In the circumstances, the transaction between the plaintiff and the first defendant were in actual fact a loan transaction secured upon bill of sale of the subject machineries but disguised as hire purchase transaction, a fact that was fortified by the issuance of a second invoice and also the transaction involved more than one good. Therefore the consideration given by the second and third defendants for the guarantee had failed and ought to be discharged of their liabilities (see paras 33–41).

(4) However, even if the transaction was not a loan secured upon bills of sale, the plaintiff's claim against the second and third defendants for the whole outstanding amount was premature and must fail as the HP agreements were not properly terminated by the plaintiff before commencement of the action. The plaintiff was only entitled to claim for the arrears instalment. Since there was no proper demand of the whole amount and neither was the instalment in arrears claimed, the plaintiff's claim was bad and ought to be dismissed (see paras 42 & 63–65).

(5) Further, the terms of the alleged HP agreements had been substantially varied by the plaintiff without the consent of the second and third defendants, as guarantors, with the result that the second and third

defendants were discharged of their liability under the letter of guarantee. There was also no offer made by the plaintiff, as the owner, to the second and third defendants to purchase the machineries and accordingly the claim was premature and must fail. There was further discrepancies in the certificate of indebtedness and it could not have been conclusive evidence of the first defendant's indebtedness (see paras 66 & 71–89).

[Bahasa Malaysia summary

Tuntutan plaintif adalah untuk jumlah yang perlu dibayar di bawah dua perjanjian sewa beli (perjanjian sewa beli tersebut) yang dimasuki di antara defendan pertama dan plaintif, kedua-duanya bertarikh 12 Februari 1996. Defendan-defendan kedua dan ketiga adalah penjamin-penjamin perjanjian sewa beli tersebut. Sebelum masa material memasuki perjanjian sewa beli tersebut, mesin-mesin telah dihantar dan dipasang di kilang defendan pertama. Melalui notis tuntutan yang bertarikh 23 September 1997, plaintif menuntut daripada defendan kedua dan ketiga, bayaran ansuran tertunggak yang jumlah keseluruhannya RM181,709.37 dan menyatakan bahawa kecuali tunggakan tersebut dibayar, kedua-dua perjanjian sewa beli tersebut 'akan dianggap terbatal'. Mesin-mesin di bawah perjanjian sewa beli tersebut tidak diambil milikan oleh plaintif ataupun dikembalikan oleh defendan pertama. Tiada juga tawaran oleh plaintif kepada defendan kedua dan ketiga untuk membeli mesin-mesin tersebut. Defendan kedua dan ketiga menyatakan bahawa: (i) transaksi di antara plaintif dan defendan pertama bukanlah satu transaksi sewa beli tetapi satu transaksi pinjaman yang dijamin melalui bil jualan dan, dengan itu, balasan dalam pemberian jaminan tersebut gagal; (ii) terma-terma perjanjian sewa beli tersebut telah diubah secara substantial tanpa kebenaran penjamin-penjamin, dengan itu membebaskan mereka daripada liabiliti mereka di bawah jaminan tersebut; (iii) tiada penamatan yang betul terhadap perjanjian sewa beli tersebut dan, dengan itu tuntutan plaintif dalam tindakan ini adalah pramasa dan juga untuk jumlah yang tidak dihutang kepadanya; dan (iv) oleh kerana tiada tawaran mesin-mesin tersebut kepada defendan-defendan kedua dan ketiga, pra syarat untuk menyaman defendan-defendan kedua dan ketiga tidak ditunaikan sebelum permulaan tindakan ini.

Diputuskan, menolak tuntutan-tuntutan dengan kos:

(1) Untuk melayakkan satu transaksi sebagai transaksi sewa beli, '*property and title*' barangan tersebut tidak harus beralih kepada penyewa pada permulaan transaksi tersebut. '*Property and title*' dipegang oleh

pembiayanya dan penyewa hanya diberikan pilihan untuk membeli barangan tersebut selepas bayaran penuh ansuran dibuat seperti yang dinyatakan (lihat perenggan 19).

(2) Di atas fakta, dengan penghantaran dan pemasangan mesin-mesin tersebut di kilang defendan pertama, jelas bahawa '*properties and titles*' mesin-mesin tersebut telah beralih kepada defendan pertama pada 21 Ogos 1995 iaitu sebelum menandatangani perjanjian sewa beli yang bertarikh 12 Februari 1995. Oleh itu transaksi di antara plaintif dan defendan pertama bukannya transaksi sewa beli (lihat perenggan 21–27).

(3) Dalam keadaan ini, transaksi di antara plaintif dan defendan pertama sebenarnya adalah satu transaksi pinjaman yang dijamin dengan bil jualan mesin-mesin tersebut tetapi dikaburi sebagai transaksi sewa beli, sebuah fakta yang disokong oleh pengeluaran invois kedua dan juga transaksi tersebut melibatkan lebih daripada satu barangan. Oleh itu balasan yang diberikan oleh defendan-defendan kedua dan ketiga sebagai jaminan telah gagal dan sepatutnya dilepaskan dari liabiliti mereka (lihat perenggan 33–41).

(4) Walaupun transaksi tersebut bukan merupakan pinjaman yang dijamin oleh bil jualan, tuntutan plaintif terhadap defendan-defendan kedua dan ketiga untuk jumlah keseluruhan yang perlu dibayar adalah pra masa dan seharusnya gagal kerana perjanjian sewa beli tersebut tidak ditamatkan dengan sempurnanya oleh plaintif sebelum permulaan tindakan ini. Plaintif hanya berhak untuk menuntut tunggakan ansuran. Oleh kerana tidak terdapat tuntutan yang sempurna terhadap jumlah keseluruhan dan juga tiada ansuran tunggakan yang dituntut, oleh itu tuntutan plaintif adalah salah dan harus ditolak (lihat perenggan 42 & 63–65).

(5) Selanjutnya terma-terma di dalam perjanjian sewa beli tersebut telah diubah secara substansial oleh plaintif tanpa kebenaran defendan-defendan kedua dan ketiga yang mengakibatkan defendan-defendan kedua dan ketiga dilepaskan daripada liabiliti di bawah surat jaminan tersebut. Juga tidak terdapat tawaran oleh plaintif, sebagai pemilik, kepada defendan-defendan kedua dan ketiga, untuk membeli mesin-mesin tersebut dan oleh itu tuntutan tersebut adalah pramasa dan seharusnya gagal. Terdapat percanggahan selanjutnya di dalam sijil keberhutangan dan ia tidak boleh menjadi keterangan muktamad keberhutangan defendan pertama (lihat perenggan 66 & 71–81).]

Notes

For cases on application of Hire Purchase Act 1967, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3873–3874.

For cases on guarantor, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3892–3893.

For cases on hire purchase agreement in general, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3867–3912.

Cases referred to

Anglo-American Corp Ltd v Goodwood Sawmill Co [1966] 1 MLJ 263 (refd)
BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors [2000] 2 MLJ 70 (refd)
Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors [1990] 1 MLJ 485 (refd)
Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd [1998] 3 MLJ 860 (refd)
Siew Nguong Hin & Ors v Mayban Finance Bhd, High Court, Penang Originating Summons No 24–864 of 1991 [516] MD 7 (refd)
Tan Tien Choy v. Kiaw Aik Hang Co Ltd [1966] 1 MLJ 102 (refd)
United Engineerings (Malaysia) Ltd v Lai Ping Yoon [1968] 1 MLJ 189 (refd)

Legislation referred to

Bill of Sale Act 1950 (West Malaysia) s 3(1)
Bills of Sale Ordinance 1936 (Sabah) s 2
Hire-Purchase Act 1967 s 4D
Sale of Goods Act 1957 s 20

Normaslina Abdul Fuad (BH Gan Nor & Kim) for the plaintiff.
WJ Chen (WJ Chen & Co) for the second and third defendants.

Ramly Ali J:

PLAINTIF'S CLAIM

[1] The plaintiff's claim is for the total outstanding amount under two alleged hire purchase agreements ('HP agreements') both dated 12 February 1996.

[2] The second and third defendants were guarantors for the alleged HP agreements pursuant to two letters of guarantee both dated 12 February 1996.

[3] The first defendant, Borneo Wood (Sabah) Sdn Bhd was wound up on 16 August 2002 and the plaintiff had withdrawn its claim on 7 December 2006 against the first defendant due to its winding up status. The trial was

only proceeded with against the second and third defendants who are the guarantors to the first defendant.

THE DEFENDANTS' DEFENCE

[4] The second and third defendants avers that:

(a) the transaction between the plaintiff and the first defendant were not hire purchase transaction as alleged or at all but were loan transaction secured upon bill of sale and, accordingly, the consideration for giving the guarantee failed;

(b) further or alternatively, the terms of the alleged HP agreements had been substantially varied without the guarantors' consent thereby discharging them of their liability under the guarantee;

(c) alternatively, there was no proper termination of the alleged HP agreements and, accordingly, the plaintiff's claim in this action is premature and also for a sum not due to it; and;

(d) there being no offer of the subject machineries to the second and third defendants as guarantors, the condition precedent for suing the second and third defendants was not fulfilled before the commencement of this action.

THE FACTS

[5] The first defendant purchased three units of Ponysaw and one unit of Resaw along with other machineries from a company identified as 'Kimanis Bay Timbers Sdn Bhd' evidenced by an invoice dated 21 August 1995.

[6] The subject machineries become the subject matters of the two alleged HP agreements both dated 12 February 1996 entered into between the first defendant and the plaintiff.

[7] Before the material time of entering into the alleged HP agreements on 12 February 1996, the subject machineries were delivered and duly installed at the first defendant's factory.

[8] By a notice of demand dated 23 September 1997 issued by the plaintiff's solicitors, the plaintiff demanded from the second and third defendants, as guarantors, payment of the instalments in arrears amounting to a total sum of RM181,709.37 and stipulated therein that unless such arrears were settled, the two alleged HP agreements 'shall be deemed terminated'.

[9] The subject machineries under the HP agreements were not repossessed by the plaintiff nor were returned by the first defendant. There was also no offer by the plaintiff to the second and third defendants (as guarantors) to purchase the subject machineries.

[10] Writ summons was taken up by the plaintiff on 29 October 1997 for the whole outstanding amount under the alleged HP agreements. Before the writ was served on the second and third defendants, the plaintiff issued the following further notices to the second and third defendants:

(a) notice of termination dated 1 January 1998 in respect of the first hire purchase agreement;

(b) notice of termination dated 1 January 1998 in respect of the second hire purchase agreement.

[11] The writ summons dated 29 October 1997 and the statement of claim was then amended by the plaintiff first on 6 January 1998 in light of payment by the first defendant. The amended writ and amended statement of claim dated 6 January 1998 was served on the second defendant but not on the third defendant.

[12] On 20 April 1998, the amended writ and amended statement of claim was further amended in light of payment by the first defendant.

[13] Before the further amended writ and further amended statement of claim dated 20 April 1998 was served on the third defendant, the plaintiff again issued the following further notices:

(a) notice of termination dated 14 May 1998; and

(b) notice of termination dated 14 May 1998.

[14] After service of the further amended writ summons on the third defendant, the plaintiff further issued the following notices:

(a) notice of termination dated 21 August 1998;

(b) letter dated 25 August 1998 demanding for payment of arrears and threatening legal action.

[15] By two statement of account both dated 22 October 1997 issued by the plaintiff itself, rebates were given by the plaintiff, namely in respect of the alleged first HP agreement, the sum of RM4,755.40, and in respect of the alleged second HP agreement, the sum of RM42,798.64.

[16] By two subsequent statement of account both dated 25 March 1999 also issued by the plaintiff, both the rebates as shown in the earlier statements of account dated 22 October 1997 were taken out by the plaintiff with the express written statement '(agreement expired on 12 February 1999, therefore no rebate given)'.

[17] The further amended writ was never served on the second defendant.

FINDINGS OF THE COURT

[18] The subject matter of the plaintiff's claim against the defendants is based on two alleged hire purchase agreements ('HP agreements') both dated 12 February 1996. Therefore it is vital in the first place for the court to determine whether the said transaction is actually hire purchase transaction. If the transaction is not hire purchase transaction, then the plaintiff's claim against the defendants would fail.

[19] For a transaction to qualify as a hire purchase transaction, it necessitates that 'property and title' of the subject good would never pass to the hirer at the beginning of the transaction. The 'property and title' are retained by the financier and the hirer is only given an option to purchase the subject goods upon full payment of the instalments stipulated thereunder.

[20] A hire purchase agreement is more than a simple contract of hire for it confers upon the hirer an option to purchase the goods. In the case of *United Engineerings (Malaysia) Ltd v Lai Ping Yoon* [1968] 1 MLJ 189, the court held:

> A contract where the property passes at once but the price is payable by instalments is clearly a credit sale. A hire purchase agreement is more than a simple contract of hire, for it confers upon the hirer an option to purchase the goods … The importance of the option to purchase lies in the fact that the hirer is unable to pass a good title to a third party, because he is not a person who has bought or agreed to buy the goods. Since the property in the goods remains in the owner who lets them on hire, the retention of the ownership of the goods and the inability of the hirer (except in special circumstances) to pass a good title provide the owner with some measure of security in case of the hirer defaults. The hirer, on the other hand, obtains the benefit of a credit transaction in that he receives the possession and use of the goods in advance of the payment of the price, and is enabled to purchase the goods once the price has been paid.

[21] In the present case, the evidence adduced during trial are as follows: **A**

(a) there was an invoice dated 21 August 1995 issued by Kimanis Bay Timbers Sdn Bhd, the seller, to the first defendant, the alleged hirer, in respect of the sale of the subject machineries;

(b) while PW1 averred that the invoice dated 21 August 1995 was merely a 'quotation' and not an invoice of sale per se, PW3 had during cross-examination confirmed that it was 'an invoice — not a quotation' and it was addressed to the first defendant; **B**

(c) PW1 conceded during cross-examination that she had 'no personal knowledge about the transaction' and her 'knowledge is based on records of the plaintiff'; **C**

(d) PW3, on the other hand, was the branch manager of the plaintiff at the material time of the alleged HP transactions who in fact 'made the letter of offer dated 19 December 1995' for the alleged HP transactions and, accordingly, had personal knowledge of the transaction; **D**

(e) PW3 confirmed that the invoice dated 21 August 1995 involved other goods sold and not merely the subject machineries; and

(f) PW3 further confirmed that, while he did not inspect the subject machineries personally at the time of the alleged HP transactions, from the contemporaneous report and photographs taken by his officer who conducted the inspection at the first defendant's factory which he had sighted at the material time, the subject machineries 'were installed at the defendant's factory'. **E** **F**

[22] It is pertinent to note at this juncture that there was absolutely no reservation of 'properties and titles' in the invoice dated 21 August 1995.

[23] In the circumstances, with the delivery and installation of the subject machineries at the first defendant's factory, it is clear that 'properties and titles' of the subject machineries would have passed to the first defendant on 21 August 1995. **G**

[24] Section 20 Sale of the Goods Act 1957, provides as follows: **H**

> Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivery of the goods, or both, is postponed. **I**

[25] In *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70 the Court of Appeal ruled as follows:

> In the absence of a contrary intention, property in specific goods passes to the buyer at the time the contract is made. And it matters not whether the parties have postponed either payment for, or delivery of, the goods.

[26] In any event, both the defence witnesses, DW1 and DW2, had testified that payment for the invoice dated 21 August 1995, was fully made by the first defendant by way of 'off-setting supply of sawn timber'.

[27] Since 'properties and titles' to the subject machineries had already passed to the first defendant on 21 August 1995 before the signing of the alleged HP agreements both dated 12 February 1995, the court is of the view that the transaction between the plaintiff and the first defendant could not have been hire purchase transaction.

[28] In *Tan Tien Choy v Kiaw Aik Hang Co Ltd* [1966] 1 MLJ 102 the Federal Court ruled as follows (at p 104):

> In fact, although the second agreement is in the form of a hire purchase agreement, it was a document to secure payment of the further advance and the balance that had not been paid in cash under the first agreement. Its real purpose was not, therefore, to effect a sale of the car by way of hire purchase, for ownership of the car had already passed to the appellant. Its real purpose was to create a security over the car for the payment of money. The court must take into account the real nature of this agreement to determine the true rights and interests of the parties.
>
> Nevertheless, the true nature of the transaction, as disclosed by this analysis, remains the test by which the rights of the parties to it must be determined. In my judgment, the agreement of 9 March 1960 was in reality an assurance of chattels to secure payment of the whole amount then owing to the respondent, given by the appellant as the then owner in favour of the respondent. As the agreement is void in respect of the chattel concerned, it follows that the ownership of the car remains with the appellant.

[29] By s 2 of the Bills of Sale Ordinance, 1936, (Sabah), a bill of sale is defined as 'an instrument in writing whereby in order to secure the payment of money one transfers to another the property he has in personal chattels, used in cases where possession is not intended to be given …'.

[30] In the present case, although the subject transactions took place in Sabah, both the agreements: exhs 'P-10A' and 'P-10C' contained the following provisions:

23. PLACE OF CONTRACT: This Agreement shall be deemed to have been made in the State or Territory in which the Owner has its registered office …

[31] It is indisputable fact that the registered office of the plaintiff is in Kuala Lumpur and, accordingly, the provisions of the Bills of Sale Act 1950 (West Malaysia) are relevant.

[32] By s 3(1) of the Bills of Sale Act 1950 (West Malaysia), while 'bill of sale' is similarly defined as in s 2 of the Bills of Sale Ordinance 1936 (Sabah), 'personal chattels' are defined to include 'goods, furniture and other articles capable of complete transfer by delivery, and trade machinery …

[33] From the above, the court finds that the transaction between the plaintiff and the first defendant were in actual fact loan transaction secured upon bill of sale of the subject machineries but disguised as hire purchase transaction.

[34] The finding that they were loan transaction secured upon bill of sale but disguised as hire purchase transaction can be fortified by the fact that a second invoice dated 2 February 1996 was issued by Kimanis By Timber Sdn Bhd in respect of the same subject machineries.

[35] In respect of this second invoice, PW3 testified to the effect that 'These are second invoice dated 2 February 1996 issued by Kimonis Bay Timber Sdn Bhd. This invoice was addressed direct to plaintiff. This was issued after letter of offer dated 19 December 1995. We disbursed the loan based on this second invoice'.

[36] While PW3 initially disagreed when put to question by testifying that 'it is not correct that the second invoice was issued at a request', upon further cross-examination, PW3 finally conceded that 'We request the supplier to issue us the invoice. This is a normal procedure. We requested the supplier to issue the second invoice'.

[37] The finding that the transaction between the plaintiff and the first defendant was not in fact hire purchase transaction can further be fortified by the indisputable fact that, in the agreement marked as exh 'P-10C', the subject machineries were expressly stated as 'Three units of Ponysaw' each bearing a different serial number and of different models.

[38] A genuine hire purchase agreement should only contain one good and not three goods cumulatively as in exh 'P-10C' for otherwise, the hirer will be deprived of the option to purchase the goods item by item rather than cumulatively.

[39] Section 4D of the Hire Purchase Act 1967, reads as follows:

(1) There shall be a separate hire purchase agreement in respect of every item of goods purchased under this Act;

(2) A hire purchase agreement that does not comply with sub-section (1) shall be void.

[40] While the subject machineries were not within the ambit of the Hire Purchase Act 1967, the Act, is nonetheless a codification of the relevant common laws in the material aspect and, thus, a genuine HP agreement should concern only one good and not three goods cumulatively.

[41] Since the transaction between the plaintiff and the first defendant were not hire purchase transaction but loan secured upon bill of sale, the court rules that the consideration given by the second and third defendants for the guarantee had failed and the second and third defendants ought to be discharged of their liabilities thereunder.

[42] Further, even if the transaction was not loan secured upon bills of sale, the plaintiff's claim against the second and third defendants, as guarantors, for the whole outstanding amount is premature and must fail as the alleged HP agreements were not properly terminated by the plaintiff before commencement of the action. Since the alleged HP agreements were not properly terminated, there could be no proper demand made on the second and third defendants, as guarantors, for the whole outstanding amount under the alleged HP agreements. Accordingly, the plaintiff's claim against the second and third defendants for the whole outstanding amount and not merely the arrears in instalments must fail.

[43] In *Anglo-American Corp Ltd v Goodwood Sawmill Co* [1966] 1 MLJ 263, the court ruled in respect of termination of a HP agreement as follows:

> Where a notice to the hirer may be said to be an implied term of the agreement, in my judgment, all that is necessary is for the owner to make a declaration or to do some unequivocal act amounting to such a declaration of his intention to terminate the hiring.

> I think I will be right if I go so far as to say that cl 4(a) of the agreement was tantamount to saying that the plaintiffs may forthwith and without notice or demand terminate the hiring by retaking possession of the property.

[44] It is pertinent to note that, in the present action, while both the alleged HP agreements contained a clause similar to the 'cl 4(a)' referred to in *Anglo-American Corp Ltd v Goodwood Sawmill Co*, there was no repossession of the subject machineries and thus there could be no 'unequivocal act amounting to such a declaration of his intention to terminate the hiring' in the sense of that case.

[45] The plaintiff merely relied on a demand notice dated 23 September 1997 issued by its solicitors to support its claim that the alleged HP agreements were terminated. However, the actual words used in the notice were 'deemed terminated' if arrears in instalments were not paid. The words 'deemed terminated' as used in the notice dated 23 September 1997 could not have been an 'unequivocal declaration', of termination of the HP agreements.

[46] The view that the demand notice dated 23 September 1997 was not an 'unequivocal declaration' was fortified by the fact that the demand notice dated 23 September 1997 was superseded by further notices respectively dated 1 January 1998, 14 May 1998, 21 August 1998 and 25 August 1998 all issued by the plaintiff itself to the second and third defendants and all claiming for payment of arrears in instalments and threatening to terminate the alleged HP agreements.

[47] The words used in each and every of the demand notices are as follows:

> … please be advised that unless your arrears of RM … are paid to Arab-Malaysian Finance Bhd within seven days from the date of this notice, we will exercise our rights to terminate the hire purchase agreement in accordance with the terms of the agreements.
>
> We will resume possession of the goods from that date …

[48] While the plaintiff attempted to argue that the said demand notices, were computer generated and therefore impliedly saying that they are not binding on the plaintiff, PW2 had during cross-examination testified as follows:

> The computer notice will generate automatically. These notices are in standard format as prescribed by the management. We need to operate the computer before the notice were printed out. After that somebody will put the notices in an

envelope and sent it out. Theses notices are printed on the plaintiff's letter head, I agree that the notices are issued by the plaintiff.

[49] PW2 then went on to testify as follows:

> Once the management inform us that the loan is terminated and put into the computer, then the default information would automatically removed from the system. If not removed, the system would continue to send reminders if there is default. The loan department has not informed me that this loan has been terminated at any time. The system has generated numerous notices to defendants two and three as generated. All these notices carried the title 'Notice of Termination'. Indirectly, we are telling the defendants that the plaintiff intended to terminate the HP. At the time of the numerous notices the HP has not been terminated yet. Just the plaintiff intended to terminate the HP.

[50] In the circumstances, the court is satisfied that, even if the demand notice dated 23 September 1997 amounts to a declaration, it had been waived by the subsequent notices respectively dated 1 January 1998, 14 May 1998, 21 August 1998 and 25 August 1998.

[51] In *Siew Nguong Hin & Ors v Mayban Finance Bhd, High Court, Penang Originating Summons No 24–864 of 1991* [516)] MD 7, Abdul Hamid J in delivering the judgment of the court held as follows:

> … by issuing 'the second notice' the defendant had waived 'the first notice'.

[52] It is pertinent to note at this juncture that the subsequent notices respectively dated 1 January 1998 and 14 May 1998 (pp 32–35, Bundle B) were issued after the filing of the writ on 29 October 1997 but before service of the writ to the defendants.

[53] It is also pertinent to note that the original writ was never served but was first amended on 6 January 1998 and then again on 20 April 1998 in light of payments by the first defendant before it was eventually served on the second and third defendants. Writ summons, although in itself is a demand, is not a demand made until it is duly served on the second and third defendants.

[54] Thus, the second and third defendants, as guarantors, had a legitimate expectation that the demand notice dated 23 September 1997 had been waived and the alleged HP agreements were still subsisting at all material times.

[55] It must also be noted that the subject machineries under the alleged HP agreement were never repossessed by the plaintiff or returned by the first defendant. There was also no offer made by the plaintiff, as owner, to the second and third defendants, as guarantors to purchase the subject machineries.

[56] The plaintiff had further by its letter dated 25 August 1998 to the first defendant clearly stated that the alleged HP agreements had yet to be properly terminated by the date of commencement of the present action (29 October 1997). The words applied in the said letter in this respect are as follows:

> You would appreciate that despite our indulgence granted, the said facilities have yet to be regularised and moreover your SCB cheque no 500456 was returned with remarks 'Payment Stopped'. The abovementioned accounts have since been classified under 'NPL' (Non-Performing Loan).
>
> TAKE NOTICE THAT, unless the arrears sum of RM390,840 is paid to us on or before 29 August 1998, we shall have no alternative but to proceed with the necessary actions deemed fit in order to protect our interest without any reference to you or the guarantors.

[57] In respect of the content of the said letter, PW3 had duly testified under cross-examination that 'I confirm the content of para 4 of the letter. This letter is not handled by me. Based on the record, the arrears sum is RM390,840. plaintiff is demanding on the arrears sum of RM390,840, not for the entire loan sum, based on this letter. Personally I don't know whether at that time the loan had been recalled or not'.

[58] From the above, it is thus clear that the alleged HP agreements were never properly terminated even as late as 29 August 1998 (after the filing of the present suit on 29 October 1997) and the plaintiff was still demanding for only the arrears of instalments at the material time but not the entire loan amount.

[59] These admissions by the plaintiff through its own witnesses' testimonies, namely PW2 and PW3, given during cross-examination that the alleged HP agreements were never terminated at the time of the commencement of this action was further collaborated by PW1's testimony as follows:

> In every notice the agreement would be terminated in the event the amount is not paid within time. At the date of the notice the agreements have not been terminated yet. It was just a warning first.

[60] Further, by the plaintiff's own statements of account respectively dated 25 March 1999, the plaintiff had clearly written that 'Agmt. expired on 12 February 1999 therefore no rebate given'. The subsequent notices respectively dated 1 January 1998, 14 May 1998, 21 August 1998 to the second and third defendants, the letter dated 25 August 1998 to the first defendant and statement of account dated 25 March 1999 were clearly expressed statements contrary to any or any proper termination of the alleged HP agreements.

[61] Further, it is pertinent to note that the statements of account both dated 25 March 1999 were documents prepared and issued by the plaintiff itself. Towards this end, PW1 testified during cross-examination as follows:

> These statements of account are dated 25 February 1999. They are prepared by me and one of my colleague. My colleague's handwritten note is there to say that the agreement expired on 12 February 1999. It was written with my agreement. I and my colleague were authorised by plaintiff to issue the statement of account. When I issued the statement I was in the course of my duty.

[62] By expressly stating in the statements of account both dated 25 March 1999 that 'Agmt. expired on 12 February 1999 therefore no rebate given', the plaintiff was estopped from denying that the alleged HP agreements was never terminated but was allowed to expire only on 12 February 1999.

[63] Since there was no proper termination of the alleged HP agreements, the plaintiff was only entitled to claim for the arrears in instalments. It follows that there could have been no proper demand for the whole amount under the alleged HP agreements as claimed in the action particularly against the second and third defendants, as guarantors.

[64] In the words of the Court of Appeal in the case of *Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd* [1998] 3 MLJ 860:

> Therefore, since the first defendant did not terminate the agreement, there was no liability of the hirer that was revealed in the statement of claim for the appellant to guarantee or make good. Under the terms of his guarantee, the appellant in no circumstances was under any liability to do so.
>
> In the present case, as the hire purchase agreement was still subsisting since the plaintiff did not determine it (under s 40 of the Contract Act) or repossess the bus (under s 16 of the Hire Purchase Act) nor did the first defendant return it to the plaintiff (under s 15 of the same Act), the plaintiff still has the right to recover instalments due under the agreement. Unfortunately for the plaintiff, there was no claim for arrears of instalments in its statement of claim. Therefore, as the plaintiff did not claim for arrears of instalments against the first defendant, there was no liability of the first defendant (hirer) for the appellant (guarantor) to make good under the terms of his guarantee.

[65] Since there was no proper demand made of the whole amount under the alleged HP agreements neither was the instalment in arrears claimed, the court is of the view that the plaintiff's claim against the defendants is bad and ought to be dismissed.

[66] Further, the terms of the alleged HP agreements had been substantially varied by the plaintiff without the consent of the second and third defendants, as guarantors, with the result that the second and third defendants were discharged of their liability under the letter of guarantee.

[67] By a letter of offer dated 19 December 1995 issued by the plaintiff, under cl 11.2, it was stipulated as a condition precedent for drawdown of the loans that the paid up capital of the first defendant shall be 'not less than RM500,000'.

[68] By exh 'P-3', which is a report by the Registrar of Companies ('ROC') dated 10 September 1997, it was revealed that the paid up capital of the first defendant remained at RM250,000 only. It is pertinent to note that this ROC report was issued as a result of a search conducted by plaintiff's solicitors at the plaintiff's instruction on 10 November 1997 and that it was done after full disbursement of the loans under both the Ponysaw and Resaw accounts in year 1996.

[69] By disbursing the loans when it is clear that the paid up capital of the first defendant was never increased to RM500,000 as stipulated by cl 11.2 of the letter of offer, the plaintiff would have waived the condition precedent for disbursement thereby varying the terms of the alleged HP agreement to the detriment of the second and third defendants as the guarantors. And since it was not proven that the plaintiff had obtained the prior consent of the second and third defendants before varying this important term of the alleged HP agreement, the second and third defendants are discharged of their liability under the guarantee.

[70] In *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors* [1990] 1 MLJ 485 the Supreme Court ruled as follows:

> The onus of proving that the surety consented to the alterations of the contract is upon the party seeking to enforce the guarantee.
>
> We agree with the learned judge that the variations were material but differ with him on the consequence of the variations. We consider that the effect of the variations were such as to discharge the third appellant Ling from his obligations

in respect his obligation in respect of the Taman Fairway and the Taman Hilltop guarantees.

[71] The court also finds that there was no offer made by the plaintiff, as the owner, to the second and third defendants, as guarantors, to purchase the subject machineries under the alleged HP agreements and, accordingly, the plaintiff's claim against the second and third defendants, as guarantors is premature and must fail.

[72] In *Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd* [1998] 3 MLJ 860, the Court of Appeal ruled as follows:

> If this opportunity to purchase the goods is not given to the guarantor, the claim by the owner against the guarantor will fail. Compliance with the proviso is a condition precedent to exercising the rights relied on by the owner against the guarantor.

[73] In the present case, the plaintiff's own evidence (through PW1 and PW3) clearly indicates that there was no offer made by the plaintiff to the second and third defendants to take over the subject machineries. The followings are what they said:

> PW1 — 'I've no idea whether the plaintiff had made an offer to the defendants two and three to purchase the machinery. Defendants two and three are the guarantors for defendant one. Personally I don't know whether plaintiff had offered defendants two and three to purchase the machinery even after the writ was filed in court. I can't recall whether there is any document or letter sent to defendants two and three to offer them to purchase the machinery.'
>
> PW 3 — 'I'm not aware any of my colleague had searched for buyer for these machinery. I'm not aware of any offer made to the defendants two and three as guarantor to take over the machinery.'

[74] The plaintiff had also failed to prove its case as even the certificates of indebtedness purportedly issued by the plaintiff pursuant to the alleged HP agreement were defective.

[75] It was expressly admitted by the plaintiff in exh 'P-8A' and 'P-8B' that there were payments made by the first defendant to the plaintiff on respectively 31 October 1997, 31 December 1997 and 13 May 1998.

[76] In this respect, PW1 testified that the total amount paid as recorded in exh 'P-8A' was RM15,636 in respect of the Resaw account whereas the total amount paid as recorded in exh 'P-8B' was RM140,700 in respect of the Ponysaw account.

[77] It is to be noted that at p 3 of the amended statement of claim under the column 'Yang dibayar', the amount of instalments paid was expressed to be RM527,625 in respect of the Ponysaw account but in the certificate of indebtedness prepared by the plaintiff on 3 May 2005 or thereabout, under the column 'Less instalment paid', the total instalments paid was expressed to be RM457,275 only.

[78] How could it be possible that the total amount of instalments paid by the first defendant be reduced from RM527,625 as at the date of the amended statement of claim, namely 20 April 1999 to RM457,275 as at the date of the certificate of indebtedness namely 3 May 2005, particularly when it was admitted by the plaintiff that there were further payments by the first defendant in the total sum of RM140,700 in respect of this Ponysaw account?

[79] Similarly, at p 4 of the amended statement of claim, under the column 'Yang dibayar', the amount of instalments paid was expressed to be RM58,635 in respect of the Resaw account but in the certificate of indebtedness prepared by the plaintiff on 3 May 2005 or thereabout, under the column 'Less instalment paid', the total instalments paid was expressed to be RM50,817 only.

[80] Again, how could it be possible that the total amount of instalments paid by the first defendant be reduced from RM58,635 as at the amended statement of claim, namely 20 April 1999 to RM50,817 as at the date of the certificate of indebtedness, namely 3 May 2005, particularly when it was admitted by the plaintiff that there were further payments by the first defendant in the total sum of RM15,636 in respect of this Resaw account?

[81] These discrepancies clearly shown that the two certificates of indebtedness prepared by the plaintiff on 3 May 2005 or thereabout [exhs 'P-5A' and 'P-5B'], and contain manifest errors, were defective and certain manifest errors and accordingly, could not have been conclusive evidence of the first defendant's indebtedness.

[82] And there being no further evidence led by the plaintiff during the trial to show the amount owing by the first defendant, the plaintiff must be taken as having failed to prove its claim and, accordingly, the plaintiff's claim against the second and third defendants ought to be dismissed.

A CONCLUSION

[83] On the balance of probabilities, the court is satisfied that the plaintiff has failed to prove its claim against the second and third defendants, and accordingly, the plaintiff's claim against the second and third defendants be dismissed with costs.

B

Claims dismissed with costs.

C Reported by Sally Kee

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